

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI 2012 FEB 15 AM 8:56

SANDRA K MARKHAM, CLERK

BY: *A. H. ch*

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Court of Appeals

Defendant.)

Case No. 1 CA-CR 11-0895

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

HEARING ON MOTION FOR GAG ORDER

MOTION FOR CAMERA COVERAGE

FEBRUARY 12, 2010

Camp Verde, Arizona

ORIGINAL

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
3

4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs) Case No V1300CR201080049
7 JAMES ARTHUR RAY,) Court of Appeals
8 Defendant) Case No. 1 CA-CR 11-0895
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24 MINA G HUNT
25 AZ CR NO 50619
CA CSR NO. 8335

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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Friday,
3 February 12, 2010, at Yavapai County Superior
4 Court, Division Pro Tem B, 2840 North Commonwealth
5 Drive, Camp Verde, Arizona, before Mina G. Hunt,
6 Certified Reporter within and for the State of
7 Arizona
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1 PROCEEDINGS

2 THE COURT: This is in V1300CR201080049, State
3 of Arizona versus James Arthur Ray, who is present
4 with his attorneys. I see Mr. Li, Mr Kelly. And
5 also?

6 MR. BRIAN. Brad Brian, Your Honor

7 THE COURT. Mr Brian on behalf of the
8 defendant, Mr Ray.

9 For the state is Bill Hughes?

10 MR. HUGHES. Yes, Your Honor. May the record
11 reflect Lily Clark, the victim representative for
12 the decedent Lizbeth Neuman is also here

13 THE COURT: Thank you

14 The first thing that we're going to take
15 up of substance will be the request to camera
16 coverage. But I wanted to note one thing just
17 administratively. There is some question that the
18 scheduling conference regarding not guilty plea,
19 Rule 8, when that started. And it starts with the
20 filing of the 12 10 notice, which was February 9.

21 That's normally when the not guilty plea was
22 entered I wanted to record that

23 With regard to camera coverage and the
24 application of Rule 122, I made a previous ruling
25 that applied to the initial appearance. And I

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1 focused on two of the factors in Subsection B, in
2 particular (5) and (6).

3 And at that time the defense had filed an
4 objection to having camera coverage. That was
5 joined by the state. I used the phrase
6 "conclusory" on the record as to the assertion as
7 to the objection to camera coverage. I didn't mean
8 that negatively. But there was reciting of the
9 factors.

10 And, Mr. Hughes, this time I see that the
11 state has objected. And it again listed the
12 factors. There is a little more time in the case
13 now. It's not been long, but as I read Rule 122,
14 and it's been pointed out to me in various filings
15 that have been submitted that the rule seems to
16 sanction a presumption, if you will, that camera
17 coverage would be permitted unless there is a
18 determination of a hardship after making specific
19 findings on the various factors listed in
20 Subsection B.

21 To follow up on the state's objection, do
22 you have -- or what factors do you have that you
23 believe warrant the balancing required under the
24 rule that would lead to a determination of hardship
25 and prohibiting or limiting cameras?

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1 MR. HUGHES: Your Honor, the factors
2 specifically that the state's relying upon are the
3 impact of the coverage upon the right of any party,
4 which would include the state, to fair trial.

5 The additional subsection that talks
6 about the impact of the coverage upon the right of
7 privacy of a witness. In this case, Your Honor,
8 there are going to be quite a few witnesses who
9 will be appearing possibly at evidentiary hearings
10 and at trial who are going to be recounting what
11 happened to them inside of a structure that is
12 going to be referred to as a "sweat lodge."

13 The events that they're going to be
14 revealing are very personal in nature. Some of
15 them suffered serious injuries. Maybe their
16 medical conditions will be discussed.

17 The Court is required under the Rule 122
18 to consider the impact of coverage upon the right
19 of privacy of a witness.

20 I do understand that the rule can provide
21 that cameras be removed from the courtroom when
22 particular witnesses are called. And I would ask
23 if the Court is considering allowing cameras for
24 certain portions of the proceeding to make that
25 ruling without prejudice as to future portions of

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1 the proceeding that might apply to witnesses who
2 are going to come in and testify at evidentiary
3 hearings or at trial.

4 THE COURT: The way the rule reads, it talks
5 about making an objection to a proceeding. And I
6 certainly think there doesn't need to be a
7 duplicated hearing every time there is a proceeding
8 that comes up in a case. I think matters can be
9 covered with some thoroughness and incorporated, if
10 you will, unless somebody has something new.

11 Mr. Hughes, you seem to be bringing up
12 things that might relate to trial concerns, perhaps
13 a more extensive motion hearing where it would be
14 actual witnesses.

15 What about these preliminary type
16 proceedings?

17 MR. HUGHES: Your Honor, with respect to the
18 preliminary proceedings, the only portion of the
19 rule that the state is relying upon is the impact
20 of the right to receive a fair trial. And
21 specifically, we're more concerned with the
22 defendant's right.

23 As cited in Ms. Polk's motion, the state,
24 as a minister of justice, has an obligation to
25 ensure that the defendant as well as the state

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1 receives a fair trial. And that is primarily what
2 we're concerned with is that cameras in the
3 courtroom could help to create the sort of
4 situation that the KPNX case talked about, a
5 carnival-like atmosphere. And that would be our
6 concern.

7 THE COURT: Mr. Brian, are you going to
8 address that issue? First of all, what is the
9 defense position right now on cameras in the
10 courtroom for this proceeding? Let's start with
11 that.

12 MR. BRIAN: I was going to start there, Your
13 Honor, and separate out trial, which I don't think
14 the Court needs to address today. For this
15 proceeding today and similar proceedings, our
16 position would be that we have no objection
17 provided certain conditions are met.

18 One is that we would ask that our client
19 be permitted to change into a suit and tie for the
20 proceeding. Secondly, subject to any security
21 concerns, that he not be shackled. Obviously we're
22 concerned about that.

23 And, third, that there be some
24 consideration -- we've already had a situation
25 where our client has been photographed now three

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1 times on so called "perp walks." And there is no
2 need for that. I think that can be handled. I
3 think another court in this county has dealt with
4 that in a similar case where you have a camera in
5 the courtroom.

6 And obviously there are logistical issue
7 about how many cameras. I understand one of your
8 colleagues has dealt that by using a single camera
9 and the various networks have sort of cooperated to
10 get access to that.

11 If those conditions are met, we have no
12 objection for proceedings like this.

13 THE COURT: I had request by fax for someone
14 to appear who hasn't really appeared. I would
15 normally prefer that that be in writing. I don't
16 know if anybody else is aware of this.

17 I'd like to know -- sir, at this point
18 state your name.

19 MR. BARR: Sure. Your Honor, we filed a
20 motion in writing. I'm Dan Barr. I represent KTVK
21 TV, the First Amendment Coalition of Arizona.

22 THE COURT: I saw this right after it came out
23 when the jury retired to deliberate just a few
24 minutes. I saw that this had come in.

25 Does anybody object to hearing from
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1 Mr. Barr in this limited context?

2 MR. BRIAN: No, Your Honor.

3 MR. HUGHES: No, Your Honor.

4 MR. MOESER: Your Honor, I'm Chris Moeser of
5 Steptoe and Johnson, on behalf of KPNX and Phoenix
6 Newspapers, Inc. We responded to the gag order
7 issue, and our client, KPNX, also submitted a
8 camera coverage request.

9 THE COURT: I was going to ask about your
10 appearance with regard to the extrajudicial
11 statement issue.

12 Any objection?

13 Your name, sir.

14 MR. MOESER: Moeser, M-o-e-s-e-r.

15 MR. BRIAN: No objection by the defense, Your
16 Honor.

17 THE COURT: Mr. Barr, Mr. Moeser?

18 MR. BARR: Yes, Your Honor. Just briefly.
19 Some of the concerns brought up are already
20 addressed by the rule, as far as whether there can
21 be one video camera and one still camera in the
22 courtroom.

23 The rule gives the Court the discretion
24 in the instances of certain witnesses to either
25 limit the camera coverage or not use the camera

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1 whatsoever. The rule already has the mechanisms of
2 some of the concerns raised here.

3 As to the state's concern here, which is
4 the impact of the coverage upon the right of any
5 party to fair trial, we set out in the papers that
6 we filed here. The U.S. Supreme Court sets the
7 standards that actual prejudice here in the
8 Chandler versus Florida case and has gone on to say
9 that pretrial publicity even if pervasive and
10 concentrated cannot be regarded as leading
11 automatically in every case to unfair trial.
12 That's the Nebraska Press case. We go on to cite
13 other cases as well.

14 They're all types of high-profile cases,
15 whether it be the O.J. Simpson case, the Evan
16 Mecham case, the John DeLorean case, whatever,
17 where people may have complained about prejudicial
18 publicity. In all those cases defendants actually
19 get acquitted.

20 The Supreme Court, both in Arizona and
21 federally, has set a very high standard for what
22 actually constitutes prejudicial publicity. Here
23 there is no factual showing whatsoever. There's
24 just merely speculation. And especially for a
25 hearing like this where there are no witnesses or
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1 jury present, there is really no reason at all not
2 to have camera coverage.

3 THE COURT: Mr. Barr, when I scan through your
4 pleading here that I just received, you talked just
5 in general about publicity. I'm talking
6 specifically about cameras. And this authority
7 you've given me, does this deal with cameras or
8 just generally First Amendment concerns in the area
9 of publicity?

10 MR. BARR: In looking at the camera issue, in
11 deciding the impact of the coverage upon the right
12 of the party to fair trial, you look at it through
13 the lens of the unfair publicity cases. So they're
14 informative in helping the Court decide that issue.

15 THE COURT: Thank you.

16 Mr. Moeser.

17 MR. MOESER: Your Honor, just to be brief and
18 not to duplicate what Mr. Barr said, I think you're
19 absolutely right that the new Rule 122, which went
20 into effect in January of last year, does create a
21 presumption of access. And unless there is a
22 showing that some likelihood of harm to one of
23 those factors in the rule outweighs the benefit of
24 the public -- and that's a key point that the rule
25 recognized for the first time with the changes in

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1 2009. The rule explicitly recognizes the benefit
2 to the public of camera coverage.

3 And I think Mr. Brian mentioned another
4 case in Prescott. I think Judge Lindberg handled
5 the first case under the new Rule 122 in the
6 DeMocker case. And, again, another high-profile
7 case allowed camera coverage to proceed under the
8 rule with one camera in the back of the courtroom
9 and imposed restrictions similar to what he has
10 proposed, to allow the defendant to dress in
11 civilian clothes in court, not show him entering to
12 and from court in shackles, not show him at all in
13 shackles while he's in the court.

14 I think those are reasonable restrictions
15 and less restrictive alternatives, frankly, than an
16 outright ban on camera coverage.

17 For the purposes for today's hearing, the
18 camera would be placed in the back of the courtroom
19 and instructed not to show the defendant at all
20 since he's not dressed as they have requested
21 today. Certainly our clients would abide by such
22 restrictions today.

23 I think for today's hearing, I think the
24 concerns the state raised simply aren't present
25 today. We're not going to hear, I don't think,

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1 forgive me if I'm wrong, testimony from witnesses
2 or victims or others where those kinds of sensitive
3 concerns could arise.

4 I think the substance of today's hearing
5 is addressing a proposed gag order, which is a
6 matter of acute public concern and something the
7 public has a right to. And for those reasons I'd
8 urge the Court to allow coverage with appropriate
9 restrictions today.

10 THE COURT: Thank you, Mr. Moeser.

11 Mr. Hughes, do you have any comments you
12 want to make regarding the proposed limitations
13 that the defense has so that cameras could be
14 permitted?

15 MR. HUGHES: Your Honor, certainly if a camera
16 is permitted in the courtroom, I believe that it
17 should be positioned in such a way that it doesn't
18 show the defendant in shackles or in a prison
19 uniform.

20 With respect to the defense's request
21 that prior to each hearing the defendant be put
22 into civilian clothing and brought into the
23 courtroom unshackled, it's going to create a
24 logistical problem for the jail.

25 This is a request that was first brought

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1 up today and hasn't been in any of the pleadings.
2 So the state doesn't have a witness prepared from
3 the jail to talk about the specific security
4 concerns that that might present.

5 But it's certainly going to create a
6 manpower question for additional time for the
7 defendant to change out of one set of clothing into
8 another set of clothes. It may also require
9 additional presence in the courtroom of more
10 deputies than would otherwise be required if a
11 person shackled, as opposed to unshackled, which is
12 a cost that's going to be passed on to the
13 taxpayers of the county.

14 So for those reasons I would oppose
15 allowing the defendant to change out of clothing on
16 hearings prior to trial. Certainly in trial when
17 there is a jury, there is every reason to allow
18 that. But prior to trial we'd oppose. That if a
19 camera is going to be placed in the courtroom, it
20 can be placed in such a way that it does not show
21 Mr. Ray.

22 THE COURT: Yes, Mr. Brian.

23 MR. BRIAN: I'm informed by my colleague,
24 Mr. Kelly, that in the DeMocker case Judge Lindberg
25 has issued an order precisely as I have requested,

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1 permitting the defendant to change into civilian
2 clothing. I'm not that familiar with that case.
3 And I recognize that this is being raised today at
4 this hearing for the first time.

5 The Court doesn't need to rule on that
6 question now. I respect the comment of my
7 colleague behind me in saying that the camera will
8 not be placed on Mr. Ray today. So I don't think
9 we have to leave the courtroom and have him change
10 into a suit to go forward today. I would ask the
11 Court to consider that for the future and possibly
12 consult with the judge in the other case.

13 THE COURT: Well, it appears there would be no
14 objection if the camera were brought in and did not
15 show Mr. Ray.

16 Is that correct for today?

17 MR. BRIAN: That's correct.

18 MR. BARR: I'll be in the minority. Mr. Ray
19 has already been photographed in this. And I would
20 say for purposes of today that we be allowed to
21 shoot him.

22 THE COURT: I'm sure that was Mr. Barr making
23 that comment.

24 MR. HUGHES: Your Honor, the state would
25 continue to stand on its objection to a camera in

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1 the courtroom.

2 THE COURT: Okay. Here's one thing: And I
3 appreciate the urgency that people view -- with
4 which people view this case. I've done what I can
5 to accommodate expedited hearings in light of a
6 jury trial that has been proceeding throughout the
7 week. I've tried to keep up with the pleadings as
8 best I could.

9 But there are other matters proceeding.
10 I don't want to disrupt getting started at least,
11 if that's where we are, on the gag order, First
12 Amendment/Sixth Amendment issue.

13 So for today there won't be cameras. I'm
14 looking and making the balancing under
15 Subsection C. I'm considering the impact of the
16 right of any parties to a fair trial, just the
17 exposure, increased exposure, at this stage anyway,
18 until there can be further consideration.

19 Another factor I'm going to note is
20 something I'm going to propose be dealt with at the
21 close of the proceeding today. And that's item 5
22 or sub 5, the adequacy of the physical facilities
23 of the court for coverage. It is adequate. But as
24 we've discussed here in the last few minutes, the
25 positioning of the camera, those things, hasn't

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1 been done.

2 What I'm going to do is invite the
3 attorneys -- and it would be good to have a
4 representative from the jail. I think we have a
5 lieutenant here. And representative of the press.
6 I've seen there are press and other media.

7 I see there is a pooling agreement, I
8 think, already that a person may be here with
9 regard to setting up the camera. I would suggest
10 that there is just a discussion strictly relating
11 to that. If people are concerned about a record, I
12 guess we can make a record on that as well.

13 But I want to see what the equipment
14 setup would require and those things and get
15 everybody's input just on where the camera would be
16 positioned, those things, if there are any kinds of
17 concerns with noise, that type of thing.

18 So for today's hearing under the
19 Rule 122, I made the findings. I find there is a
20 likelihood of harm arising from one of the more of
21 the above factors that outweighs the benefit to the
22 public of camera coverage. And I discussed the
23 specific factors and those findings.

24 The next issue has to do with the
25 extrajudicial statements or gag order. It can be

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1 phrased in that manner. And since no one objected
2 to Mr. Barr appearing and having input on the
3 camera issue -- I know the state has filed pleading
4 saying there is no objection to Mr. Barr
5 intervening now on the First Amendment/Sixth
6 Amendment issue.

7 Is that the case, Mr. Brian?

8 MR. BRIAN: We have no objection either, Your
9 Honor.

10 THE COURT: Okay.

11 And I want to tell you, not to prejudge
12 anything, but from reading through the material
13 I've received so far, I'm already inclined -- I
14 think I will be granting the relief in part.
15 Because I don't think anybody disagrees with it.
16 It has to do with the application of ethical
17 rules 3.6 and 3.8(f).

18 The only thing I would say about that is
19 there may be some concern as to whether the rule is
20 narrow enough. Is it overbroad? And there is some
21 guidance provided by the comments to the rule.

22 And also in one of the cases I've looked
23 at, the Levine versus U.S. District Court for the
24 Central District of California, 764 F.2d 590, there
25 is language in that case that deals with narrowing

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1 the scope of an order. It parallels fairly closely
2 a number of the items and the comments to Rule 3.6.

3 But I think an order supplementing
4 that -- an order supplemented with those items
5 could be useful. It's, essentially, embodying the
6 admonishment into an order. And that was suggested
7 by -- I believe in Mr. Barr's submission. I think
8 so.

9 Anyway, with that in mind, that may focus
10 the argument people want to present. I'll just say
11 this: I have some authority I want to read. I
12 will in all likelihood take any advisement, any
13 further refinement, of that or the -- or any
14 addition to the order, as I've stated.

15 Mr. Hughes.

16 MR. HUGHES: Thank you, Your Honor. Your
17 Honor, the state has filed a motion as well as a
18 reply to the defendant's opposition. The state
19 does not have an opposition with the two news media
20 briefs that have been filed and the request to
21 intervene on the issue of the gag order.

22 In writing we put in our new opposition
23 to the KPNX motion to intervene and just today
24 received the Barr motion, which, I believe, applies
25 only to the camera coverage. But if Mr. Barr wants

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1 to give his two cents on the other one, we don't
2 have a problem with that.

3 Your Honor, I'd like to start out with an
4 objection to a pleading that was filed today by
5 Mr. Ray entitled "Further Response to State's
6 Request for Order Directing all Parties to Refrain
7 from Extrajudicial Comments."

8 Your Honor, the rules of criminal
9 procedure in Arizona allow a motion, a response,
10 and a reply. They don't allow what is,
11 essentially, a response to a reply, which this
12 pleading is.

13 I'm speaking specifically of Rule 35.1.
14 And more particularly, Your Honor, the authority
15 and the way this further response is worded is
16 extremely deceptive. Or just -- I may be reading
17 it entirely wrong. But it purports to cite from
18 the Gentile case, which is a U.S. Supreme Court
19 case. However, it cites only to the portions of
20 the Supreme Court case that were written by
21 Justice Kennedy that were in the minority. And
22 this response never says to the Court that they're
23 citing only to Justice Kennedy's minority opinion.
24 The way the brief is written, it appears to be
25 citing it as if it was the controlling authority.

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1 And specifically and more to the point,
2 on page 3 it sets forth a proposed quote by
3 Justice Rehnquist. Justice Rehnquist did have a
4 number of portions of that opinion that were
5 majority opinions. This quote on the top of page 3
6 is a quote of Justice Kennedy. And it's a quote
7 from his minority opinion.

8 So I would ask the Court to take a look
9 at the Gentile opinion. And I'm sure the Court
10 will because it does appear to be controlling
11 authority in this case. But the portions of the
12 Gentile opinion as cited in this further response
13 are not the controlling portions of that opinion.

14 And when -- the Gentile opinion is
15 relatively confusing because there are five or six
16 parts to Justice Kennedy's opinion, and only two of
17 those parts are controlling -- parts three and
18 parts six. There are three or four parts to
19 Justice Rehnquist's opinion, and there are several
20 controlling portions of Justice Rehnquist. And I
21 would submit that Justice Rehnquist's portion that
22 have the five justices concurring are the
23 controlling portions of that opinion.

24 Your Honor, with respect to the merits of
25 the issue of the gag order, the KPNX case, which is

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1 an Arizona Supreme Court case, explains the Court
2 does have an authority to issue a gag order to
3 prevent, basically, what's become a carnival-like
4 atmosphere.

5 Ms. Polk's brief on the issue also goes
6 and talks about the other authority that explains
7 the state has a vital interest as a minister of
8 justice ensuring that a fair trial for both sides
9 occurs. And with a trial taking place, the Gentile
10 case is very clear. The Court does have the
11 ability to restrict the statements of counsel
12 beyond what would ordinarily be the Court could
13 restrict for nonparties or nonlawyers in a case.

14 That's simply what the Court should do in
15 this case. They should restrict the parties from
16 making extrajudicial statements. This case needs
17 to be tried in court. Any statements out of the
18 court given the carnival-like atmosphere have a
19 substantial likelihood of prejudicing the outcome
20 of the case.

21 Your Honor, I'm referring specifically
22 now to Justice Rehnquist's controlling opinion,
23 which starts at page -- or specifically I'm
24 referring to page 1074 of the U.S. Reporter.

25 In that, in the controlling opinion of
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1 the Gentile case, Justice Rehnquist says, because
2 lawyers have special access to information through
3 discovery and client communications, their
4 extrajudicial statements pose a threat to the
5 fairness of a pending proceeding since lawyers'
6 statements are likely to be received as specially
7 authoritative. Your Honor, that's what the state
8 seeks to have occur in this case.

9 There has been a great deal of mention in
10 the briefs about the ethical rules. The ethical
11 rules are an alternate set of authority that can
12 allow for judicial oversight or certainly
13 quasijudicial oversight by the Supreme Court in the
14 form of a disciplinary proceeding.

15 That oversight takes place months, if not
16 years, after a violation takes place. The ethical
17 rules which govern a lawyer's conduct are separate
18 from what the state is basing its authority upon,
19 which is the Court's inherent power to control the
20 court proceedings and to make sure that both sides
21 receive a fair trial and to avoid a carnival-like
22 atmosphere, such as the KPNX case suggests the
23 Court has the power to do.

24 I think our reliance on saying that well,
25 the parties are bound by the ethical rules and

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1 therefore no gag order is needed is myopic for that
2 very reason because any orders that might come from
3 the Supreme Court later as a sanction are going to
4 be too little too late.

5 Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Hughes. I did want
7 to ask if you could specify exactly what kind of an
8 order you're looking for. Because --

9 If I could ask Mr. Hughes that first,
10 Mr. Brian.

11 The responses show -- talk about some
12 very well-founded concerns about very broad
13 coverage of various areas. But the bullet points
14 to say what you actually want to have the order
15 apply to, that talks about all the attorneys or
16 staff representing or employed on behalf of the
17 defendant, all attorneys or staff in Yavapai County
18 Attorney's Office, and then all employees and staff
19 of the Yavapai County Sheriff's Office as well.

20 And I think you clarified that some in
21 your reply. But what exactly do you contemplate in
22 the order?

23 MR. HUGHES: Your Honor, we request an order
24 prohibiting the entities that we've listed on
25 page 1 of the state's motion, which are the

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1 attorneys and their staff. And we did file a
2 supplement that I included the defendant and the
3 employees of James Ray International.

4 After the weekend following the filing of
5 that request, a number of statements were placed on
6 the website that Mr. Ray's company runs. And I
7 believe we attached those as an exhibit.

8 Your Honor, what we're seeking is to
9 enjoin the defendant and employees of his company
10 and his attorneys from making statements to the
11 press about the merits of the case, about the facts
12 of the case. Certainly issues pertaining to
13 scheduling of the case, we would ask the Court,
14 consistent with the authority cited in the state's
15 response and reply, to appoint some sort of a media
16 person in the court administration's office.
17 That's been done in other cases. And we provided
18 the authority for that.

19 That's simply because a number of news
20 agencies have requested information, basically, on
21 an hourly basis as to when is the next hearing,
22 what's the hearing going to entail. And if there
23 is a media point person in the clerk's office, I
24 believe that person could, basically, respond to
25 media requests and say the next hearing is on such

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1 and such date and leave it at that.

2 So we would ask for the order to enjoin
3 the parties, including the county attorney, the
4 sheriff's department, the defendant and his
5 employees, and the attorneys and their staff from
6 making statements to the press about the facts of
7 the case.

8 THE COURT: I should mention, as I did review
9 a press release this afternoon, there has been
10 created a website that can be accessed. Is
11 everyone aware of that? The clerk now has a
12 website. That should take care of a lot of the
13 concerns with just getting basic information out to
14 the public.

15 Mr. Brian.

16 MR. BRIAN: Your Honor, let me start where
17 Mr. Hughes started. That is with the supplemental
18 pleading we filed today. The state asked for an
19 expedited hearing in this case. We agreed to that
20 to accommodate their request subject, of course, to
21 Your Honor's own scheduling because it was an issue
22 that was important to the state. We wanted to do
23 what we could.

24 We agreed to that and filed an expedited
25 response. Yesterday when we were preparing for

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1 this, frankly, we realized that the case on all
2 fours with this is the Gentile or Gentile case,
3 however you pronounce it. That is the case I'm
4 going to argue from right now. We thought it would
5 be helpful to the Court and, frankly, the state to
6 bring that to your attention beforehand. We would
7 urge the Court to spend time with that. It's the
8 case that controls.

9 Mr. Hughes has misread it in terms of who
10 wrote what opinion. It is confusing. Because I
11 had some trouble with it yesterday as well. What
12 he's actually referring to is the syllabus part.
13 Justice Rehnquist, an Arizonan, not a particularly
14 left-wing liberal, wrote sections 1 and 2 of the
15 opinion, which are the ones we quote from. There
16 are separate opinions.

17 He dealt with an ethical rule in Nevada,
18 which was their version of 3.6, virtually identical
19 to the rule here. And he found that the
20 application of that rule to sanction the defense
21 counsel was unconstitutional and in violation of
22 the First Amendment. The case is on all fours with
23 this.

24 The only difference in the case, because
25 it dealt with a situation where a defense counsel

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1 made public statements to the media in response to
2 a swarm of negative publicity to counter that
3 publicity. The only difference was that was a
4 situation where the Nevada State Bar sought to
5 sanction the lawyer for having made those
6 statements, and the Supreme Court reversed that.

7 Here we're dealing with a situation where
8 it's not just a sanction. The state is seeking a
9 prior restraint.

10 I'm not a First Amendment scholar, but
11 one thing I do remember from my days at law school
12 in constitutional law is that prior restraints are
13 ground upon absent some risk of a clear and present
14 danger, which Justice Rehnquist says means a
15 substantial risk of imminent and potential -- and
16 prejudice. That risk does not apply here.

17 This is an emotion-charged case. Since
18 the incident happened on October 8, the press has
19 been overwhelmed. It has been devastating to
20 Mr. Ray. It has been devastating to his business.
21 It has been devastating to his hundreds of
22 supporters.

23 Your Honor, I can tell you that we have
24 declined far more requests for interviews than we
25 chose to give in response to the negative

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1 publicity. We do not intend to try this case in
2 the press. We are unhappy with the statements that
3 were made, largely by the sheriff in this case.
4 The sheriff improperly commented on my client's
5 exercise of his constitutional rights.

6 We brought Mr. Ray down here to surrender
7 to the authorities pursuant to a discussion we had
8 with Mr. Hughes and Ms. Polk a week before. They
9 then arranged to have two "perp walks," which were
10 shown on TV. The sheriff made public statements
11 that were designed to play to the emotions. We
12 think that was improper.

13 Now, it happened. We're not here seeking
14 sanctions for it. But what Justice Rehnquist said
15 in the Gentile case is that defense counsel not
16 only is entitled to respond to that, but is duty
17 bound to respond to it.

18 One of the things he says, and I quote,
19 is there is no question that speech critical of the
20 exercise of the state's power lies at the very
21 center of the First Amendment, unquote.

22 We live in a world where in many
23 countries people cannot criticize the government.
24 We see it right now in Iran. In this country we
25 are expected to respond and speak out publicly. He

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1 said in that decision that the attorney had a
2 right, indeed a duty, to, quote, stop a wave of
3 publicity he perceived as prejudicing potential
4 jurors against his client and injuring his client's
5 reputation in the community.

6 He said an attorney's duties do not begin
7 inside the courtroom. He or she cannot ignore the
8 practical implications of a legal proceeding for
9 the client. An attorney may take reasonable steps
10 to defend a client's reputation.

11 Now, in this case, Your Honor, we made
12 measured statements in response to publicity that
13 we did not want and we did not create. The
14 publicity here was caused in part by the
15 authorities and in part because of the emotionally
16 driven nature of the case. We recognize that. But
17 we chose to make measured responses in response to
18 that publicity.

19 Mr. Ray has hundreds of people who
20 support him. Those supporters have been crying out
21 for him to tell his side of the story for months.
22 We did not do that. And we chose -- we decided we
23 had no choice but to respond to that.

24 I do want to say one thing in response to
25 a factual, I think, error in Mr. Hughes's papers.

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1 There was a proceeding in response to a motion that
2 was made by the media to get access to certain
3 search warrant materials. The state originally
4 opposed that. We did have an opportunity to be
5 heard. The Judge ruled on that and ordered the
6 materials to be disclosed.

7 Subsequent to that the state chose to
8 release hundreds of pages of the investigative
9 materials. We were not consulted on that. There
10 was not a court hearing. We were not given the
11 opportunity to object to that.

12 The timing of that was maybe
13 coincidental. But one of the disclosures, which
14 included his financial information, his Social
15 Security number, came right at the top of the
16 indictment. I can't remember if it was right
17 before or right after.

18 But we had no opportunity to respond to
19 that in any way, to either object to it or to
20 request any conditions being put on that.

21 I'll give you another example. Last week
22 the press reported that two individuals that were
23 employees of Mr. Ray, ardent supporters of
24 Mr. Ray -- I think I've got the quote correctly --
25 have agreed to testify for the prosecution.

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1 The clear import of that statement was
2 that these two employees had come to the conclusion
3 that Mr. Ray had done something wrong. Nothing
4 could be further from the truth.

5 Those two individuals will testify with
6 regard to the facts in this case, and they will
7 tell the truth, whether it's in response to
8 questions by the state or in response to questions
9 by the defense.

10 But we now feel obligated to respond to
11 the misimpression that was left in the press by
12 publicity that we did not generate.

13 So then the question, Your Honor is, what
14 should the Court do? I don't think any order is
15 necessary or appropriate. I think the Court should
16 remind the lawyers that they're bound by ethical
17 rules 3.6, and in the state's case, 3.8.

18 If we have a situation where either side
19 believes or the Court on its own believes that
20 someone is creating this clear and present danger,
21 this imminent danger of harm -- for example, during
22 jury selection or after we've selected a jury,
23 where Justice Rehnquist said, the rules may be
24 different in that situation -- the Court will have
25 to deal with that at the appropriate time.

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1 But to issue any order at this point
2 other than simply say from the bench I remind
3 counsel of their obligations, I would say is
4 unjustified and unnecessary in this case.

5 I would also say two other things. One
6 is the state has not pointed to a single statement
7 that anyone made associated with the defense that
8 they say creates that sort of danger.

9 And, secondly, I know of no authority
10 that would curtail the First Amendment rights of my
11 client in connection with his website, which goes
12 out to people who support the efforts he's made
13 through the many years of his business. That is a
14 blatant -- would be a blatant violation of the
15 First Amendment.

16 I would just preserve a chance to respond
17 to any further comments by Mr. Hughes. And, of
18 course, I'll answer any questions Your Honor would
19 have.

20 THE COURT: Thank you. Do you think there is
21 some constitutional issue with Rule 3.6? Does it
22 not meet strict scrutiny standard that is applied
23 in the First Amendment?

24 MR. BRIAN: I think in Gentile the Court ruled
25 that 3.6 on its face is not -- is constitutional.

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1 What they found was as applied to that case, it was
2 unconstitutional.

3 So I would answer it the same way. On
4 its face I think the Court can say that the
5 parties -- the counsel -- I don't think it applies
6 to Mr. Ray. The counsel are bound by 3.6. I think
7 if Your Honor were to say, as requested by the
8 state, under 3.6 the parties are precluded from
9 making any extrajudicial statements, that's
10 unconstitutional, I believe.

11 THE COURT: That's what the comments and
12 similar language from Levine can be helpful in that
13 regard.

14 Thank you, Mr. Brian.

15 MR. BRIAN: Thank you, Your Honor.

16 THE COURT: Mr. Barr, you wanted to say
17 something?

18 MR. BARR: Just briefly. I wish I'd spoken up
19 sooner. Rule 3.6 and 3.8 were amended by the state
20 bar in the supreme court in 2003 to -- as an effort
21 to comply with the -- I can't even remember the
22 name of the case. The Gentile case. I was on that
23 committee.

24 So this discussion about how 3.6 doesn't
25 comply with Gentile is sort of a phoney one because

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1 Gentile -- 3.6 was amended after the Gentile case.
2 So the current version that we're looking at
3 addresses many of the concerns that have been
4 brought forward today.

5 I would return back to what Your Honor
6 brought up earlier. I would just have an order, if
7 you're considering one at all, admonishing the
8 parties to follow their duties under 3.6 and 3.8,
9 which conform with the Gentile case.

10 THE COURT: Thank you.

11 Mr. Moeser.

12 MR. MOESER: Thank you, Your Honor. And thank
13 you for the opportunity to be heard and for
14 allowing us to intervene in this case.

15 Let me just start briefly with what we
16 agree with both of the parties on. We appreciate
17 that the state has clarified their original motion,
18 which was written broadly enough that it could have
19 encompassed public record and could have been read
20 as prohibiting the sheriff's office, for example,
21 from releasing public record. They have since
22 clarified that that's not what they meant and that
23 they don't intend to address public records.

24 And, frankly, the state has been diligent
25 in the last several weeks in releasing public

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1 records, as they're required to under the public
2 records law.

3 We also agree with the defense that the
4 state has made, frankly, no showing whatsoever of
5 any substantial likelihood of prejudicing -- of any
6 statements that would prejudice this case,
7 particularly this very early stage of the
8 proceedings.

9 We've been involved in a number of
10 similar high-profile cases -- the serial shooter
11 case in Phoenix recently on behalf of KPNX and PNI.
12 And I can say what the state seeks in this case is
13 really unprecedented. They seek a gag order that
14 would prohibit extrajudicial comments by any of the
15 parties in oral or written form as to any aspect of
16 the case from now presumably until the end of
17 trial, which could be six, nine months, a year,
18 down the road.

19 It's, frankly, overbroad and unnecessary
20 at this time. Both -- everyone has discussed the
21 Gentile case so far, which, as Mr. Barr pointed
22 out, our rule reflects. But in that Rehnquist
23 opinion, that really forms the nut of that case.
24 There is still a requirement that the state must
25 show a compelling state interest that would be

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1 served by the gag order. And then whatever order
2 is entered would be narrowly tailored to serve that
3 interest.

4 At a fundamental the level the state has
5 to make a factual showing of some reasonable
6 likelihood of prejudice caused by some statement
7 that's out there. If you look at the state's
8 paper, the state has pointed no examples made by
9 the defense or anyone else that has posed a serious
10 risk of prejudicing this case.

11 It seems to operate from the presumption
12 that any publicity is prejudicial publicity. And
13 the Supreme Court in the case that Mr. Barr
14 mentioned earlier, the Nebraska Press case, held
15 simply that just because there is publicity of the
16 case does not necessarily mean there is prejudice.

17 Both the Gentile case and Rule 3.6 list
18 examples -- it's actually in the comments to
19 Rule 3.6 -- of potentially prejudicial statements
20 that could be found to prejudice the proceeding.
21 There are statements that go to character and
22 credibility or reputation of witnesses, statements
23 about the criminal records of witnesses or parties
24 or the defendant, statements about possible plea
25 bargains or negotiations between defense and the

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1 prosecution, statements about confessions or
2 admissions, statements about polygraph tests or
3 other evidentiary test results.

4 There have been no examples in any of the
5 pleadings of statements like that that have been
6 made so far that would somehow prejudice these
7 proceedings. Again, the state is, essentially,
8 seeking a blanket gag order many months before any
9 trial date is even set.

10 And as the second circuit observed in the
11 Solomon case in a remarkably similar gag order, the
12 state -- the second circuit struck down a gag order
13 that applied to, quote, any statements that have
14 anything to do with this case or that may have
15 something to do with the case. That's,
16 essentially, what the state is seeking here.

17 The state mentioned the KPNX case and the
18 reference to the carnival-like atmosphere. That
19 was actually a reference to the Shepard versus
20 Maxwell case, which was the case that the fugitive
21 was based in Cleveland, and it was sort of the dawn
22 of the television age. And the carnival-like
23 atmosphere was actually in the trial.

24 It was, essentially, the Judge who lost
25 control of the courtroom by permitting multiple

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1 cameras which the technology of the time, huge
2 cables and lights.

3 The rules on camera coverage and the
4 restrictions and the Judge's power to limit the
5 environs of the courtroom have dealt with that
6 issue.

7 And the KPNX case, and to the extent that
8 the state tries to rely on that, is entirely in
9 apposite here. The gag order in the KPNX was
10 entered after jury selection. The scope applied
11 only to the trial participants. Here the scope is
12 everyone involved.

13 And in KPNX the Court made detailed
14 findings about the case, which was a mob
15 murder-for-hire case, which there were allegations
16 of threats against jurors. There is just no
17 similar facts the state has brought forward here to
18 justify a proposed gag order.

19 The suggestion about the media liaison
20 order, I think your comment is well taken that a
21 website can address those concerns. I think if
22 there is a need for that, it may be if this case
23 goes to trial down the line.

24 The other part of the analysis under
25 Gentile and KPNX and the whole line of cases is the

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1 Court should considerable reasonable, less
2 restrictive alternatives to entering prior
3 restraining, which is what the gag order is.

4 And I think the suggestion of an
5 admonishment to follow rules 3.6 and 3.8 is
6 entirely appropriate. The Court retains the
7 inherent power that the state mentioned, to
8 sanction attorneys in the case if there are
9 violations. So there is no worry about a long,
10 drawn-out process.

11 The other thing that is present here is
12 the Supreme Court and a number of other courts have
13 recognized that voir dire is an adequate
14 alternative to screen out potential prejudice in
15 the case. And I don't mean to minimize the impact
16 of the Court and parties on this. It's a
17 time-consuming process. And the Gentile case
18 recognizes that.

19 But speech -- prior restraints on speech
20 cannot be constitutionally justified where less
21 restrictive alternatives exist. And there has been
22 no showing of any real substantial risk to the
23 case.

24 Just in conclusion, given the early stage
25 of this case and lack of any evidence presented by
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1 the state of any real substantial risk to
2 prejudice, I would urge the Court to restrict the
3 state's proposed gag order. And if you decide to
4 adopt anything, pursue the admonishment to the
5 parties with the right to revisit the issue later
6 if anything else arises.

7 Thank you, Your Honor.

8 THE COURT: Mr. Hughes.

9 MR. HUGHES: Your Honor, again,
10 Justice Rehnquist's opinion in the Gentile case
11 does not begin until page 1062 of the U.S.
12 Reporter. The quotes that Mr. Brian would
13 attribute to him come from Justice Kennedy in the
14 noncontrolling portion of that opinion.

15 And certainly I would ask that he and his
16 associates review the case again maybe this
17 evening. And if they disagree with me, fine. But
18 if they agree with me, I would ask them to retract
19 those misstatements to the Court.

20 Your Honor, with respect to prejudice of
21 statements, Comment 6 to Rule 3.6 notes that
22 criminal jury trials are most sensitive to
23 extrajudicial speech. Comment 5 specifically notes
24 that character credibility and reputation of a
25 party in any opinion as to the guilt or innocence

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1 of the defendant are suspect in the case,
2 specifically is prejudicial in a criminal jury
3 trial.

4 Your Honor, Justice Rehnquist in his
5 controlling portion of the Gentile case talks about
6 voir dire, which the defense -- I'm sorry -- which
7 the attorney for the news media mentioned as a
8 possible way of weeding out jurors in the future
9 who may be prejudiced.

10 And he states, even if a fair trial can
11 ultimately be ensured through voir dire, change of
12 venue or some other device, these measures entail
13 serious cost to the system. Extensive voir dire
14 may not be able to filter out all of the effects of
15 pretrial publicity. And with increasingly
16 widespread media coverage of criminal trials, a
17 change of venue may not suffice to undo the effects
18 of the statements such as those made by the
19 petitioner.

20 The state has a substantial interest in
21 preventing officers of the Court, such as lawyers,
22 from imposing such costs on the judicial system and
23 on litigants. And I'm referring to a quote that's
24 on page 1075 of the U.S. Reporter.

25 Your Honor, with respect to a restraint
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1 on free speech, the Gentile case had a narrow
2 holding. And it determined that as applied under
3 the facts of Gentile, the Nevada State Supreme
4 Court rule was unconstitutional because it was
5 unduly vague as applied to him.

6 We are asking for court order that would
7 not be unduly vague, that would be very clear, that
8 would say do not make statements to the media.
9 Reserve your statements about the merits of the
10 case to the courtroom.

11 That would avoid the circumstance that
12 the majority in the Gentile case found was
13 unconstitutional. And that's what we're asking the
14 Court to do.

15 With respect to statements by Mr. Ray and
16 by his employees, to the extent that the employees
17 are controlled by Mr. Ray, the Court does have the
18 ability to control the speech of litigants that are
19 before it.

20 And I will call the Court's attention to
21 the discussion on the U.S. Reporter that starts on
22 page 1072 and runs on to 1073. They state, we
23 expressly contemplated that the speech of those
24 participating before the courts could be limited.
25 This distinction between participants in

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1 litigations and strangers to it is brought into
2 sharp relief by our holdings. And they give some
3 citations to other cases.

4 Your Honor, with respect to an example of
5 a statement that's been given so far, the state is
6 capable of giving that example. However, by
7 repeating what that statement is, I believe it
8 would again prejudice the right of Mr. Ray to
9 receive a fair trial because it would be a comment
10 on something that probably shouldn't be commented
11 on in the press. Because by repeating that, we're
12 going to have exactly the sort of harm that the
13 state is asking to have the gag order on.

14 And so I'd either -- if the Court is
15 looking for a specific comment, I would ask that we
16 either be able to do that in a closed session of
17 the court. The comment was -- in the example was
18 included among the materials that we provided in
19 the supplement to our gag order motion, however.

20 THE COURT: Thank you. Mr. Hughes, aren't you
21 really asking for much narrower than what's
22 contemplate in 3.6 and 3.8?

23 MR. HUGHES: Your Honor, in a sense, yes. And
24 3.6 and 3.8 serves a particular purpose. And that
25 purpose is to regulate the ethical conduct of

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1 attorneys. The purpose is not to provide rules of
2 procedure for a courtroom, and it's not to govern
3 how trials occur, although they overlap in
4 purposes.

5 What we are asking is not premised upon
6 3.6. We're asking that the Court exercise the
7 authority that was recognized in the KPNX case and
8 impose the gag order based on that authority and
9 not on the 3.6 and 3.8.

10 What we're seeking, in a sense, is more
11 limited than what the Rule 3.6 and 3.8.

12 THE COURT: What does that do to the
13 obligations Mr. Brian has talked about? In quoting
14 one of the opinions from the Gentile case -- and I
15 guess there is some dispute between two of you
16 anyway as to what the actual opinion is. But what
17 about those obligations that Mr. Brian refers to?

18 MR. HUGHES: Your Honor, the obligations
19 Mr. Brian is referring to come from
20 Justice Kennedy's section of the Gentile case.
21 Justice Kennedy only wrote two portions of his
22 opinion that were joined by a majority of justices.
23 And those are sections 3 and 6 of Justice Kennedy's
24 opinion.

25 The quotations that Mr. Brian gave to the
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1 Court came from earlier sections of
2 Justice Kennedy's opinion. And those were not
3 joined. They do not have controlling authority
4 from the Supreme Court. And, if anything, they are
5 in conflict with the portion of the opinion written
6 by Justice Rehnquist that did have five justices.

7 THE COURT: Mr. Brian?

8 MR. BRIAN: Yes, Your Honor. We're going to
9 need to pull out the opinion. I understand why
10 Mr. Hughes is confused by it. He's quoting from
11 the syllabus. If you look at the opinion, at least
12 of a copy I have here, what you find is it says
13 that the chief justice delivered the opinion of the
14 Court with respect to parts 1 and 2. Then there is
15 a syllabus, which counsel quotes from, which is not
16 part of the Court's opinion -- the syllabus written
17 by a publisher someplace.

18 They then go on to talk about who argued
19 the opinion. That always goes before the actual
20 opinion. It then says, Justice Kennedy announced
21 the judgment of the court and delivered the opinion
22 of the court with respect to parts 3 and 6 and an
23 opinion with respect to parts 1, 2, 4 and 5, in
24 which Justice Marshal, Justice Blackmun and
25 Justice Stevens joined. I'm quoting from parts 1

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1 and 2, which Chief Justice Rehnquist wrote joined
2 by the justices -- they were also named. But the
3 Court I'm sure will figure that out on your own.

4 The real question is is there any basis
5 whatsoever to ask this court to do anything? And
6 with all respect, Your Honor, to the state, they
7 have a lot of chutzpah. Because the sheriff has
8 made comments that violated Rule 3.6. They
9 commented. It says right here, one of the things
10 you cannot say is that the defendant invoked his
11 constitutional right of the privilege against
12 self-incrimination. You cannot say that the
13 investigation is now focused on Mr. Ray and suggest
14 his guilt.

15 He is presumed innocent in this
16 courtroom. And we made measured response in
17 compliance with Ethical Rule 3.6 to respond to
18 that. And we're entitled to do that.

19 To answer the Court's question, to the
20 extent anyone reads 3.6 or any other rule of this
21 court to say that flat out we cannot make any
22 public statements, that would be unconstitutional.

23 We are well aware of our obligations with
24 respect to the media. We are well aware of our
25 obligations with respect to Mr. Ray.

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1 His business has been devastated. His
2 reputation has been devastated. For months,
3 Your Honor, we got overtures from his supporters,
4 please tell us Mr. Ray's side. We then decided we
5 needed to do that. And to the extent necessary to
6 do that, we will continue to do that. But we are
7 well aware of the risk of doing -- of going too
8 far. And we don't intend to do that.

9 But the courts recognize -- the rules
10 recognize that defense counsel. In a case that
11 attacks his reputation as much as this one does,
12 have an obligation to respond. And so we would
13 respectfully ask the Court to simply remind the
14 parties of their obligations.

15 I don't believe any order is either
16 appropriate or necessary here. Simply a reminder
17 of what we're supposed to do. And I think both
18 sides should be reminded of that. But I don't
19 think any order is appropriate and certainly not an
20 order as requested by the state.

21 THE COURT: Thank you.

22 Mr. Moeser.

23 MR. MOESER: Your Honor, just briefly. The
24 proposed gag order by the state is much broader
25 than anything contemplated by 3.6 because it would

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1 restrict any statement other than anything about
2 procedure to the public, by parties, by attorneys
3 and by members of government, including the
4 sheriff's office. It just simply goes to far.

5 If you look at KPNX, which is an Arizona
6 Supreme Court case, that dealt with gag orders. It
7 paid particular attention to the scope and
8 duration. There is a discussion in the case about
9 the limited duration of the gag order. It was
10 entered after jury selection, after the trial
11 process began, and lasted through the end of the
12 trial. There was no gag order in place, as would
13 be proposed here from literally the week after the
14 arrest through the duration of the proceedings.

15 And the Arizona Supreme Court paid
16 particular focus on that and also limited the scope
17 to just the participants of the trial. And, of
18 course, here we're not approaching trial yet.

19 There just hasn't been the showing --
20 required requisite showing by the state to show the
21 basis to meet that standard for prior restraint
22 here.

23 THE COURT: Okay. Thank you.

24 MR. BARR: Your Honor.

25 THE COURT: Mr. Barr.

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1 MR. BARR: I'm sorry to beat a dead horse.

2 But, I mean, people need to look at what Rule 3.6
3 actually says. Rule 3.6(c) allows precisely the
4 type of statements Mr. Brian was talking about. We
5 don't have to do anything here but to actually read
6 what the ethical rules say.

7 And I've never heard this notion
8 proffered by the state that they somehow don't
9 apply to what people do in a courtroom or at trial.
10 But I can assure you it applies to every activity
11 that a lawyer participates in.

12 MR. HUGHES: Your Honor, the state is not
13 arguing that Rule 3.6 does not apply to a lawyer's
14 conduct. We're saying it is a disciplinary
15 procedure that is between the lawyer and the state
16 bar.

17 We are asking for the Court, pursuant to
18 its powers under KPNX and its inherent powers to
19 provide for a fair trial to both sides, to issue
20 this gag order even though there may be a sanction
21 that might be imposed against that lawyer someday
22 six months from now or a year from now, or five
23 years from now if the state bar or if this Court
24 finds unethical behavior.

25 THE COURT: Thank you.

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1 Well, I will advise that the attorneys
2 are to comply with rules 3.6 and 3.8. And the
3 matter is under advisement. I'm certainly going to
4 read the Gentile case and other authority as well.
5 And I'll issue whatever I issue in a further
6 ruling. I'll make a further ruling or elaborate
7 further if necessary.

8 I wanted to ask you, Mr. Hughes, did you
9 have any other comment you wanted to make about the
10 request with regard to clothing for Mr. Ray if he's
11 in custody and appears here in court?

12 MR. HUGHES: Your Honor, I think the issue
13 would require testimony from the jail as to
14 security concerns that the Court would have to
15 weigh before it made that determination. As I
16 said, I believe there could be security concerns
17 and also cost to the county and to the sheriff's
18 department and additional manpower to have Mr. Ray
19 brought over more early to change him into clothing
20 or to change him into clothing in the jail, as well
21 as possibility of requiring additional deputies to
22 come and be present in the courtroom while Mr. Ray
23 is in the courtroom.

24 I think that would be my opinion just as
25 someone who has been involved with the court system

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1 now for some time. But I think we need more than
2 the opinion of a lawyer. We need to hear from an
3 actual person who knows what they're talking about.
4 That would be a lieutenant or sergeant from the
5 detention facility.

6 THE COURT: Mr. Brian.

7 MR. BRIAN: Let me just add, Your Honor, that
8 the sheriff's deputies, many of whom are in the
9 courtroom today, have been very helpful and
10 cooperative with Mr. Ray during his incarceration.
11 They did allow us to spend a few minutes with
12 Mr. Ray beforehand in a holding cell.

13 And I respect what Mr. Hughes said.
14 Obviously the Court should consider the concerns of
15 the people who are guarding Mr. Ray.

16 I would think physically and logistical
17 if we brought clothing for Mr. Ray, there would be
18 an opportunity for him to change. And I'm not
19 asking the Court to rule on that right now. But I
20 would say that we would certainly cooperate with
21 all the authorities to minimize any burden and make
22 the logistical issues as easy as possible.

23 THE COURT: Thank you.

24 I still want to have the informal meeting
25 unless the attorneys are opposed to that -- meeting

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1 with the media with regard to camera placement,
2 anything else that might come up.

3 Does anybody have an issue with that?

4 MR. BARR: No, Your Honor.

5 MR. BRIAN: May we participate in that?

6 THE COURT: Oh, yeah. I'm inviting the
7 attorneys -- I want people to participate. And I
8 intend to have it informal, just talk with whoever.

9 MR. BARR: Your Honor, if it's convenient, we
10 can do it after this hearing.

11 THE COURT: That's what I mean. That's what
12 I'm going to say. If you want to wait. I do have
13 a notice that the jury will be returning. So we'll
14 recess from this. And if people will wait a while,
15 we'll meet with the attorneys and the
16 representatives of the media.

17 MR. HUGHES: Your Honor, may I raise one other
18 issue before we go off the record? That is there
19 pending is a motion for release conditions. And
20 one of the items submitted was an ex parte
21 communication to the Court. The state is filing an
22 objection to that.

23 We would ask that the Court refrain from
24 viewing that ex parte communication at all until it
25 has an opportunity to read our response and our

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1 objection and any response or reply from the other
2 side.

3 THE COURT: I haven't read it yet. So --

4 Mr. Brian.

5 MR. BRIAN: Your Honor, I've been doing this
6 for 30 years. And I would think that to consider
7 the state's objection, you would probably want to
8 read it to decide whether or not it is something
9 that it's appropriate. We think it is. It deals
10 with sensitive financial and attorney-client
11 information. And I would ask the Court to read it,
12 consider the state's objection, and then make a
13 ruling. We may respond to their objections but ask
14 you to defer ruling until we have a chance to do
15 that.

16 THE COURT: I know Mr. Li made an avowal as to
17 the general nature of the contents.

18 MR. LI: That's correct, Your Honor.

19 MR. HUGHES: Your Honor, my concern is based
20 on our preliminary research this point that
21 indicates it could be an -- essentially, a judicial
22 canon violation to look at this based on what we
23 found. And that's what we wanted put the Court and
24 make this request until we can provide briefing so
25 the Court can make an informed decision.

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1 MR. BRIAN: On that point, I'll look forward
2 to reading the state's papers. But the defense in
3 many cases I've been involved in have made
4 in-camera filings that reveal information that is
5 protected by attorney/client privilege or reveal
6 defense strategies as otherwise confidential.

7 So I don't know of anything. I will look
8 at Mr. Hughes's authorities, and we will file a
9 response. But I don't think anything is in
10 violation of any judicial canons or any other
11 authority I'm aware of.

12 THE COURT: Well, Mr. Hughes, when will you
13 file a brief?

14 MR. HUGHES: Your Honor, I will have that
15 filed by the first half of next week.

16 THE COURT: Okay. By Thursday. Have it by
17 then.

18 Everything needs to be faxed or emailed
19 in this matter right now. I want people to take
20 service by fax or email so we can get responses in
21 and deal with things rapidly.

22 MR. BRIAN: I'm sorry. I missed that. When
23 does the state intend to file?

24 THE COURT: Well, he said by middle of next
25 week. But I thought with Monday, the holiday,

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1 Thursday. I'd like to have it by Thursday.

2 MR. BRIAN: The hearing is on the 23rd. If it
3 will be possible -- I don't want to be in a rush.
4 If he can file by Wednesday, we can file the
5 response by Friday.

6 THE COURT: I know I provided a couple of the
7 of dates. Is there a hearing now?

8 MR. BRIAN: There is on the 23rd.

9 THE COURT: Okay. I wasn't aware of that.

10 So Wednesday, Mr. Hughes.

11 MR. BRIAN: And we'll file a response by
12 Friday, the 19th.

13 THE COURT: Okay. All right. I'll confirm
14 the current setting of the case management
15 conference and the existing conditions of release
16 at this point. And we will recess.

17 Thank you.

18 (The proceedings concluded.)
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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss REPORTER'S CERTIFICATE

3

4 I, Mina G Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 13th day of February, 2012

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MINA G HUNT, AZ CR No 50619
CA CSR No 8335

Mina G Hunt (928) 554-8522

1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE
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